IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 26 OF 2001.

Mrs. Shaikh Safina Salim,
alias Safina Shaffi Mohammad Kahrekar,
d/o Salim A. Gani Shaikh,
R/o Banallah Chawl, Room No.9 and 10,
New Colony, Ambernath, Taluka
Ambernath, Dist. Thane, Maharashtra. .... Appellant.

Versus

Mr. Shaffi Mohammad Kajrekar,
major, son of Pir Mohammad
Kahrekar, resident of H.No/
108/11, (191/11) Ghateshwar Nagar,
Khorlim, Mapusa, Goa. .... Respondent.

Shri S. R. Rivonkar, Advocate for the Appellant.

Shri P.J. Karkera, Advocate for the Respondent.

CORAM: A. P. LAVANDE, J.

DATE: 7th APRIL, 2006.

ORAL JUDGMENT:

Heard Mr. Rivonkar, for the Appellant and Mr. Karkera for the Respondent.

2. By this appeal, the appellant takes exception to Order dated 30th January, 2001 passed by the Civil Judge, Senior Division, Mapusa dismissing Civil Misc. Application No.165/2000/Sr/I and Civil Misc. Application No.

166/2000/Sr/I in Matrimonial Petition No. 45/99/Sr/I filed by the appellant for condonation of delay and setting aside ex-parte decree.

3. Briefly, the facts which are relevant for the disposal of this appeal are as under :-

The appellant married the respondent on 27.4.94 in Goa. Thereafter in the year 1999 the respondent filed Matrimonial Petition No. 45/99/Sr/I in the Court of First Addl. Civil Judge Senior Division, Mapusa for divorce on the ground of ill treatment. An ex-parte decree of divorce was passed on 13.10.99. The ex-parte decree came to be passed, since the appellant who was defendant in the said suit was served by substituted service chose not to contest the proceedings. On 22.6.2000 two applications, one for condonation of delay and the second one for setting aside the ex-parte decree were filed by the appellant herein. According to the appellant/defendant on 9.7.99 i.e. the date on which the defendant was allegedly served by substituted service, she was in Ulhasnagar, Maharashtra and therefore she had no notice of the proceedings of divorce filed by the respondent. The claim was contested by the respondent and the trial Court held that the appellant was duly served and relying upon the bailiff's report dismissed both the applications.

4. Mr. Rivonkar, learned Counsel appearing for the appellant

submitted that the trial Court exercised jurisdiction illegally in not allowing both the applications filed by the appellant. According to the learned Counsel there was no reason for the trial Court to disbelieve the affidavit filed by the appellant to the effect that from 24.6.98 she was not at Sawantwadi, but she was at her Uncle's place at Ulhasnagar and if she had knowledge of the proceedings she would have definitely contested the proceedings for divorce filed against her by the respondent. The learned Counsel further submitted that by passing the impugned order, serious prejudice has been caused to the appellant inasmuch as the decree for divorce on the ground of ill treatment has been passed ex-parte against the appellant without any opportunity having been given to her to contest the proceedings.

5. Per contra, Shri Karkera, learned Counsel appearing for the respondent, submits that the trial Court was absolutely right in dismissing both the applications and there is absolutely no jurisdictional error committed by the trial Court. He further submitted that the trial Court was justified in placing reliance upon the report of the bailiff which clearly established that the appellant was properly served by substituted service. He further submitted that the decree for divorce having become final, the respondent has now got married and has got two children and on this count only the appeal deserves to be dismissed.

6. I have considered the submissions made by the learned Counsel. It is pertinent to note that by the impugned Order, the trial Court has refused to set aside the ex-parte decree of divorce passed against the appellant on the ground of ill treatment. Ordinarily a litigant has to be given a reasonable opportunity to contest the proceedings unless there are malafides or intention to protract the proceedings. In the present case, it is the case of the appellant that she was not at Sawantwadi at the time the bailiff is supposed to have effected service by substituted service. I also find considerable merit in the submission of Mr. Rivonkar that the trial Court ought not to have disbelieved the affidavit filed by the appellant that from 24.6.98 she was at Ulhasnagar and therefore she had no notice of the proceedings filed against her. Since the impugned decree of divorce has been passed ex-parte, it would be in the interest of justice to set aside the same, subject however to terms. In my opinion, the trial Court ought to have allowed the application for condonation of delay as well as the application for setting aside the ex-parte decree filed by the appellant subject to payment of costs and to that extent the trial Court has not exercised jurisdiction in accordance with law. In so far as the marriage of the respondent after passing of the decree is concerned, the same cannot be a bar to allow the applications filed by the appellant.

7. In the result, therefore, the appeal succeeds. The impugned Order dated 30th January, 2001 is quashed and set aside. Both the applications filed by the appellant that is, Civil Misc. Applications No.165/01 and 166/01 are allowed. Consequently the decree dated 13.10.99 passed in Matrimonial Petition No.45/99/Sr/I is quashed and set aside. The appellant to file written statement within a period of four weeks from today. Needless to mention that since the matter is a matrimonial matter, the trial Court shall dispose of the same expeditiously. The appellant to pay to the respondent costs which are quantified at Rs.1000/-. The costs shall be deposited in the trial Court within a period of two weeks from today and after deposit is made, the respondent is at liberty to withdraw the same.

Appeal stands disposed of in the above terms.

A. P. LAVANDE, J.

sl.